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No. 84-198

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LOUIS E. OLIVERO,

Appellant,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Appellate Court Of Illinois, Third Judicial District

MOTION TO DISMISS AND TO DENY ALTERNATIVE RELIEF

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MOTION TO DISMISS AND TO DENY ALTERNATIVE RELIEF

Appellee, by his attorney, NEIL F. HARTIGAN, Attorney General of the State of Illinois, moves this Court to dismiss the appeal filed herein and to deny the alternative relief requested by appellant pursuant to 28 U.S.C. §2103 inasmuch as the constitutional validity of a state court statute is not drawn into question by this case and no substantial federal question has been presented by appellant's Jurisdictional Statement.

I.

THE PROCEEDINGS BELOW

On November 9, 1982, appellant's client, Paul Powers, was indicted for the arson of Shirley's Tavern. (C. 3) The People filed their answer to the defendant's request for discovery pursuant to Supreme Court Rule 412 and listed the names and addresses of persons whom they intended to call as witnesses at trial, including Ted and Nina Errio. (C. 9-11) On May 27, 1983, the trial court ordered that trial commence on August 29, and on August 5, the defendant answered the People's demand for discovery pursuant to Supreme Court Rule 413. In his answer, the defendant also listed as potential witnesses Ted and Nina Errio. (C. 26, 36-37)

On August 10, 1983, the grand jury reconvened in a continuing investigation of the arson of the tavern. (C. 63) Nina Powers testified that she was now divorced from Ted Errio and answered questions concerning the arson and whether Ted Errio might have been involved. She further responded that she understood the State's Attorney was not really concerned about her possible participation in the offense. (C. 64-85) Ted Errio also appeared before the grand jury, but after answering a few preliminary questions, he refused to answer any others. (C. 85-89) An attorney for both Nina Powers Errio and Ted Errio was present during the grand jury proceedings. (C. 64, 86)

On August 22, 1983, the defendant filed an Emergency Motion for a Temporary Restraining Order seeking to prevent transcription of the August 10 grand jury proceedings or alternatively to prevent the State's Attorney from

reviewing the transcript if it had already been typed. (C. 38-45) The basis for the defendant's motion was his contention that the State's Attorney had improperly used the grand jury procedure to obtain an evidence deposition from Nina Powers Errio and Ted Errio after the defendant had listed those persons as potential witnesses in his criminal defense. At a hearing on the motion held that day, the State's Attorney explained the State's theory of the case against defendant to be that two witnesses would testify that the defendant was hired by Ted Errio and Nina Powers Errio to commit the arson. Ted Errio was the target of the August 10, 1983, grand jury and the State's Attorney had offered Nina Powers Errio immunity for her testimony. (R. 4, 20-21) They had not previously been called before the grand jury because it had only been days since the State's Attorney learned that the defendant had rejected his long-standing offer of leniency in exchange for defendant's testimony against Ted Errio. (R. 5-10, 37-41) The trial court denied the defendant's motion, finding that the State's Attorney's action in subpoenaing the Errios before the grand jury in a continuing investigation was not improper. (C. 26, 44)

On August 26, appellant received by mail a transcript of the August 10 grand jury proceedings and filed on behalf of his client a notice of appeal from the August 22 order denying his motion for a temporary restraining order. (C. 53-55) He also filed an Application to Stay Proceedings in an effort to stay the commencement of the jury trial scheduled to begin Monday August 29, 1983, and a motion for a continuance of the criminal trial on the ground that he was appealing the denial of the request for a temporary restraining order. (C. 56-92) These motions were denied. (C. 91)

On August 29, appellant informed the judge that he had filed a notice of appeal from the denial of his motion to stay and that the trial court was thereby deprived of jurisdiction to proceed. (R. 24, 25) The court, finding that the defendant was not entitled to an interlocutory appeal under Illinois law, granted the People's motion to strike the Notice of Appeal. (R. 28-31, 41, 42) That day, appellant further informed the court that he had advised the defendant not to appear at that time because the appellant had filed a notice of appeal. (R. 52) The trial judge then responded that he had advised appellant on Friday that the trial would commence on Monday. (R. 52-53)

Apparently after a recess, the court reconvened at 1:59 p.m. with only the trial judge, appellant, the State's Attorney, and the clerk present. The trial judge stated for the record that, at appellant's direction, the defendant was not present and that appellant refused to begin the trial. (R. 53-54) The trial judge also stated that he had told appellant repeatedly that if he did not commence the trial he would be held in contempt of court and fined $1,009.00. (R. 54) After appellant again informed the court that he would not proceed to trial, he was found in contempt and fined $1,009.00. (R. 54-56; C. 105-07)

On appeal to the Appellate Court of Illinois, Third Judicial District, the appellate court held that no grounds existed to support the grant of a temporary restraining order and that in any event defendant's attempt to press an interlocutory appeal was unauthorized. The court further noted that even if appellant's legal theories were sound, the fact would not justify his refusal to proceed to trial. While the finding of contempt was affirmed, the court reduced the fine imposed to $500.00. *People v. Powers, et al.*, 122 Ill. App. 3d 629, 461 N.E.2d 549 (3rd Dist. 1984). The Illinois Supreme Court denied leave to appeal June 5, 1984.

II.

ARGUMENT

THE VALIDITY OF ILLINOIS SUPREME COURT RULE 413 WAS NOT RAISED OR DECIDED BY THE STATE APPELLATE COURT, IS IRRELEVANT TO RESOLUTION OF THE CASE, AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE JURISDICTIONAL STATEMENT.

Appellant's invocation of this Court's jurisdiction pursuant to 28 U.S.C. §1257(2) is premised upon the contention that Illinois Supreme Court Rule 413 (Ill. Rev. Stat. 1979, ch. 110A, §413) is unconstitutional. Appellant, however, did not attack the constitutionality of the rule in the state appellate courts and the issue was not addressed by those courts. Moreover, the validity of Rule 413 is irrelevant to the propriety of his contempt citation. This Court's appellate jurisdiction accordingly does not lie. Nor has appellant presented a substantial federal question for review warranting exercise of this Court's discretion to grant a petition for writ of certiorari pursuant to 28 U.S.C. §§1257(3) and 2103.

The law is clear in Illinois that in the absence of an enabling statute or Supreme Court Rule, the defendant in a criminal case may not prosecute an interlocutory appeal. *People v. Miller*, 35 Ill.2d 62, 219 N.E.2d 475 (1966); *People v. Zach*, 77 Ill. App. 3d 17, 395 N.E.2d 753 (3rd Dist. 1979). In the present case, appellant sought to appeal the denial of his request that the State be prohibited from transcribing and reviewing grand jury testimony allegedly obtained in violation of his client's rights. As the appellant held, this order was not appealable under Illinois law and, accordingly, the filing of appellant's Notice of Appeal did not deprive the trial court of jurisdiction over the cause. *See Miller, supra.*

It is also clear in Illinois that, as a general rule, if a trial court has jurisdiction over the parties, its orders must be obeyed until set aside by a reviewing court and the validity of a lawyer's position asserted on behalf of his client does not excuse otherwise contemptuous conduct. *People v. Graves*, 74 Ill.2d 279, 383 N.E.2d 1311 (1979); *People v. Haas*, 100 Ill. App. 3d 1143, 427 N.E.2d 853 (1st Dist. 1981). In *Maness v. Meyers*, 419 U.S. 449 (1975), this Court similarly recognized that one who refuses to obey even improper orders will typically risk criminal contempt inasmuch as "[r]emedies for judicial error may be cumbersome but the injury flowing from an error generally is not irreparable and orderly processes are imperative to the operation of the adversary system of justice." *Id.* at 460. There, however, compliance with a court order of production in violation of the fifth amendment would in fact have led to irreparable injury; unlike in *United States v. Blue*, 384 U.S. 251 (1966), the "cat" was not yet "out of the bag". *Id.* at 463.

The order in the present case was not an order to produce but to proceed with the trial of a pending criminal prosecution. Moreover, appellant was found in contempt of court only after he had complied with discovery and the grand jury proceedings had been transcribed and reviewed. Because proceeding to trial would not irrevocably exacerbate any violation of his client's rights, "[s]ubsequent appellate vindication . . . [would] have its ordinary consequence of totally repairing the error." *Maness, supra* at 460. *See also United States v. MacDonald*, 435 U.S. 850 (1978).

Appellant also posits that his citation for contempt violates the first and sixth amendments. These contentions, however, were not presented to the appellate court and have been waived. In any event, they are without merit. Appellant's conduct in refusing to proceed to trial after

numerous unequivocal orders to do so is manifestly not protected speech. And even assuming imposition of a $1,009.00 fine without incarceration triggers the right to trial by jury [*but see Munis v. Hoffman*, 422 U.S. 454 (1975)], it has been clear since this Court's decision in *Taylor v. Hayes*, 418 U.S. 488, 496 (1974), that the State may reduce a contemnor's sentence so as to obviate the need for a jury trial. *See also Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *Gerard v. Goins*, 575 F.2d 160 (8th Cir. 1978); *Douglas v. First National Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1976).

III.

CONCLUSION

For the foregoing reasons, appellee respectfully requests that this Court dismiss the appeal filed herein and deny the alternative relief requested by appellant pursuant to 28 U.S.C. §2103.

Respectfully submitted,

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